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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1968

JAMES EDMUND BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 307

JAMES EDMUND BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

As appears from the chronology given in petitioner's statement of facts and the brief order of the Court of Claims (Pet. App. A, p. 1a), the only question presented is whether the six year statute of limitations applicable to actions in the Court of Claims, 28 U.S.C. 2501, had run prior to his filing of this action for disability retirement pay on November 25, 1966.

Petitioner, a Lieutenant Colonel, was released from active duty in the Army, "not by reason of physical disability" (Pet. 6), on December 13, 1957. His

initial application to the Army Board for Correction of Military Records, to correct his record to show retirement for service-connected disabilities, was denied without hearing on October 12, 1960, on the ground of "insufficient evidence [of] * * * probable material error or injustice" in the discharge. (Affidavit of Raymond J. Williams, Executive Secretary of the Army Board for correction of Military Records, filed July 31, 1967.) Both of these events occurred more than six years before the filing of this action.

Petitioner was given a hearing before the Board on November 29, 1961, after he had submitted several requests for further consideration of his application together with the depositions of two doctors, and after he had sought to compel the Secretary of the Army to grant him a hearing through an action for a writ of mandamus. The Board's subsequent decision to deny his application was reported to him in a letter from the Under Secretary of the Army, dated February 23, 1962, approving this action. Both of these events occurred less than six years before the filing of this action.

On the United States' motion to dismiss, the Court of Claims held the claim barred, finding that petitioner's cause of action had accrued no later than October 12, 1960—the date on which his request for correction of his record was first denied (Pet. App. A, p. 1a). This holding appears to have been an application of the detailed standards which the court announced in *Friedman* v. *United States*, 310 F. 2d 381 (Ct.Cl.), certiorari denied *sub nom. Lipp* v. *United States*, 373 U.S. 932, for applying the statute

of limitations in military disability-retirement pay cases. The court there reasoned that there could be no cause for action in the Court of Claims for military disability-retirement pay in the absence of an administrative decision; but that the cause of action would accrue with the *first* final administrative decision. "Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute by reason of further applications to other boards or agencies * * *" (310 F. 2d at 396).

The October 12 refusal of petitioner's request was the first decision by a competent board in this case. Petitioner does not challenge the basic standard in *Friedman*; he only denies that the October 12 decision was "final."

Friedman stated (310 F. 2d at 396):

> A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopening, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.

Whether under this standard a particular action is final is a factual issue, inappropriate for review in this Court.*

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* As the record indicates, the Board rejected the request for review because the petitioner had failed to submit sufficient evidence "to indicate probable material error or injustice" in the original discharge. This is not a misleading or tentative decision, and it does not invite the petitioner to reopen the case.

Petitioner also argues that approval by the Secretary of the Army is necessary in order to make any Board decision "final." But there is no requirement under pertinent Army regulations, set out in the Appendix, *infra*, that the Secretary review actions of the Board authorizing hearings or denying applications for correction without hearing, as distinct from actions of the Board taken on a "record of proceedings," after hearing. The decision of October 12 was of the former variety, and therefore was "final" when made. Petitioner's cause of action accrued at that point, *Friedman* at 396 ff. To permit him to extend further the time for suit by pressing repeatedly for discretionary administrative reconsideration of the same matter would extend the statute of limitations beyond the period Congress provided.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1968.

APPENDIX

ARMY REGULATIONS 8 January 1962
No. 15-185

BOARDS, COMMISSIONS, AND COMMITTEES
ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

Section III. APPLICATION FOR CORRECTION

10. Review of application. Each application and the available military or naval records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing or to deny the application without a hearing. * * * In connection with any application which it considers, the Board may recommend to the Secretary that the records be corrected, as requested by the applicant, without a hearing. The Board may deny an application if it determines that insufficient evidence has been presented to indicate probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him, that effective relief cannot be granted, or that the applicant did not file his application within 3 years after he discovered the alleged error or injustice and that insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed 3 years. * * * If the application is denied, the applicant will be advised of the denial and that he is privileged to submit new and material evidence for consideration.

* * * *

Section VI. ACTION ON APPLICATION

19. Action by the Board. * * *

* * * *

c. Record of proceedings. When the Board has completed its proceedings, a record thereof will be prepared. * * * The record will include the application for relief, a transcript of any testimony, affidavits, papers, and documents considered by the Board, briefs and written arguments filed in the case, the findings, conclusions and recommendations of the Board, and all other papers, documents, and reports necessary to reflect a true and complete history of the proceedings. * * *

20. Action by Secretary of the Army. The record of proceedings of the Board will be forwarded to the Secretary of the Army who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the Board for further consideration when deemed necessary.

U. S. GOVERNMENT PRINTING OFFICE: 1969 O—339-881 187